

1 MICHAEL CHAIT  
HAYLEY VENTOZA  
2 MONTGOMERY SCARP & CHAIT PLLC  
1218 THIRD AVENUE, SUITE 2500  
3 SEATTLE, WA 98101  
(206) 625-1801  
4 ATTORNEYS FOR DEFENDANT

5  
6  
7  
8 **UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

9 LAWRENCE DARREN MOLDER,

10 Plaintiff,

11 v.

12 BNSF RAILWAY COMPANY, A  
Delaware corporation,

13 Defendant.

No. 2:18-cv-00257-TOR

**DEFENDANT BNSF RAILWAY  
COMPANY'S RESPONSE TO  
PLAINTIFF'S MOTION TO  
STRIKE**

14  
15 Pursuant to the Court's Jury Trial Scheduling Order (ECF No. 13), BNSF  
16 submits the following response to plaintiff's motion to strike Samantha Rogers'  
17 Declaration.

18 On July 15, 2019, BNSF took the deposition of plaintiff's union  
19 representative Tim Gillum. Due to various scheduling difficulties, the parties had  
20

1 previously agreed to take several depositions, including Mr. Gillum's, after the  
2 discovery deadline. ECF No. 26.

3 At his July 15, 2019 deposition, Mr. Gillum testified for the first time that  
4 certain unidentified comparators had received "cut-letters" for similar activities. At  
5 no time before the deposition had plaintiff ever provided information or evidence  
6 that there was anyone whom he contended received disparate discipline. In  
7 discovery responses specifically asking for "all facts supporting your contention  
8 that you were subjected to an adverse employment action as a result of FRSA  
9 protected activity," plaintiff never identified anything remotely close to alleged  
10 disparate treatment of others. *See* Chait Decl. Ex. 1 (Plaintiff's Response to  
11 Interrogatory 5). Indeed, the entirety of the initial disclosure with respect to Mr.  
12 Gillum reads:

13 3. Molder's Union's Members, Officers, and Agents

14 Members of Molder's union are likely to have knowledge of, inter alia,  
15 BNSF's policies, procedures, and practices regarding the work Molder was  
16 performing when he suffered his work-related injury, work-related injuries,  
17 and employee discipline; and Molder's injury and discipline. These people  
18 include Dave Carroll, Tim Gillum, Milt Monroy, Don Sanford. BNSF  
19 possesses Molder's union's members, officers, and agents' contact  
20 information.

18 Chait Decl. Ex. 2. (Plaintiff's Initial Disclosures). Plaintiff never indicated in  
19 his initial disclosures (or elsewhere) that Mr. Gillum purported to have comparator  
20 information, nor did he ever provide the details of such comparator information.

1 As such, BNSF has moved to exclude this evidence. *See* Motion in Limine No. 39,  
2 ECF No. 53 at 49:10-50:7.

3 In the event that Motion in Limine No. 39 is denied, BNSF has added these  
4 two witnesses and will offer them in rebuttal, for impeachment. Their names were  
5 added to the witness lists a mere seven days after Mr. Gillum's deposition, which  
6 was the first time BNSF became aware of the subjects of Mr. Gillum's testimony  
7 and purported knowledge on this subject, since it was not previously disclosed as  
8 required by Federal Rule of Civil Procedure 26(a)(1)(A)(i). As such, to the extent  
9 Mr. Gillum is allowed to testify on purported comparators, BNSF's disclosure of  
10 such witnesses shortly after it first was made aware of the issue was substantially  
11 justified and it must be allowed to offer witnesses to rebut Mr. Gillum's testimony  
12 and credibility on this issue. *See, e.g., Kumar v. Williams Portfolio 7, Inc.*, No.  
13 C14-657RAJ, 2015 WL 11714566, at \*4 (W.D. Wash. Aug. 13, 2015) (Rule  
14 26(a)(1)(A)(i) "is relaxed when an individual is not being used to support the  
15 disclosing party's claims or defenses or whose use would solely be for  
16 impeachment" and permitting undisclosed witness to testify only as rebuttal  
17 witness); *Interactive Health LLC v. King Kong USA, Inc.*, No. CV 06-1902-  
18 VBF(PLAX), 2008 WL 11339129, at \*2 (C.D. Cal. July 24, 2008) ("There is no  
19 automatic disclosure requirement for witnesses whose testimony is solely used for  
20 impeachment.").

1 Dated this 27<sup>th</sup> day of August 2019.

2  
3 Montgomery Scarp & Chait PLLC

4 s/ Michael Chait

5 Michael Chait, WSBA No. 48842

6 Hayley Ventoza, WSBA No. 46309

7 Attorneys for BNSF Railway Company

8 1218 Third Avenue, Suite 2500

9 Seattle, WA 98101

10 Telephone: (206) 625-1801

11 Facsimile: (206) 625-1807

12 [mike@montgomeryscarp.com](mailto:mike@montgomeryscarp.com)

13 [hayley@montgomeryscarp.com](mailto:hayley@montgomeryscarp.com)

**CERTIFICATE OF SERVICE**

I am over the age of 18 and not a party to this action. I am the assistant to an attorney with Montgomery Scarp & Chait PLLC, whose address is 1218 Third Avenue, Suite 2500, Seattle, Washington, 98101.

I hereby certify that a true and complete copy of *DEFENDANT BNSF RAILWAY COMPANY'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE* has been filed with the United States District Court via the ECF system, which gives automatic notification to the following interested parties:

Joseph Grube  
Karen Orehoski  
Breneman Grube  
Orehoski, LLC  
1200 5<sup>th</sup> Ave, Ste 625  
Seattle, WA 98101

Nicholas D. Thompson  
The Moody Law Firm, Inc.  
500 Crawford Street, Suite 200  
Portsmouth, VA 23704

Heather C. Barden  
Barden & Barden  
PO Box 8663  
Spokane, WA 99203

I declare under penalty under the laws of the United States of America and the State of Washington that the foregoing information is true and correct.

DATED this 27th day of August, 2019, at Seattle, Washington.

s/Katherine Eiler  
Katherine Eiler, Paralegal